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STATEMENT OF FACTS

Respondents Missouri Commission on Human Rights and Missouri Commission on Human Rights Chairman Sterling Adams (Collectively referred to as the "Commission") supplement the statement of facts of Appellant Roma Martin-Erb. Though accurate, Martin-Erb's statement is incomplete.

Appellant filed her complaint with the Commission on January 21, 1997, alleging that she was illegally terminated by Wal-Mart on January 11, 1997. (L.F. 22).¹ Appellant claimed that she was discharged due to her race. (L.F. 22). After an investigation by the Commission, the Executive Director on February 4, 2000, found that there was not probable cause to credit Martin-Erb's allegations of discrimination and closed her complaint. (L.F. 5)

Appellant never requested a right to sue letter, yet on March 6, 2000, filed this action in circuit court against the Commission. After Wal-Mart's unopposed motion to intervene was granted, the circuit court on July 14, 2000, issued a final judgment quashing its preliminary order in mandamus and dismissing Appellant's case. (L.F. 41). Appellant then filed this appeal on August 22, 2000. (L.F. 52).

¹ Legal File is abbreviated as L.F.

Point Relied On

The Circuit Court correctly ruled when it quashed its preliminary order in mandamus and dismissed Martin-Erb's cause of action because Martin-Erb cannot state a claim in mandamus for the relief she sought, nor for other relief against the Missouri Commission on Human Rights.

State ex rel. Bd. of Health Ctr. Trustees of Clay County v. County Comm'n of Clay County, 896 S.W.2d 627 (Mo.banc 1995)

State ex rel. Missouri Growth Assoc., et al. v. State Tax Commission, et al., 998 S.W.2d 786 (Mo.banc 1999)

State ex rel. Johnson v. Griffin, 945 S.W.2d 445 (Mo.banc 1997)

St. Louis Police Officers' Ass'n v. Sayad, 685 S.W.2d 913 (Mo.App. E.D. 1984)

' 213.075.3 RSMo.

' 536.100-140 RSMo.

' 536.150 RSMo.

STANDARD OF REVIEW

When reviewing a circuit court's denial of a writ of mandamus, the issue is whether the circuit court reached the correct result. *Mid-Missouri Limestone v. County of Callaway*, 962 S.W.2d 438, 440 (Mo.App.W.D. 1998); *Wheat v. Bd. of Probation & Parole*, 932 S.W.2d 835, 838 (Mo.App.W.D. 1996). "The court's decision will not be reversed if the court exercised its discretion lawfully and no abuse is shown." *Wheat*, at 838, *citing Sampson Distributing Co. v. Cherry*, 346 Mo. 885, 143 S.W.2d 307, 309 (1940). The judgment of the circuit court will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously applies or declares the law. *Mid-Missouri Limestone*, at 440; *Wheat*, at 838.

ARGUMENT

The Circuit Court correctly ruled when it quashed its preliminary order in mandamus and dismissed Martin-Erb's cause of action because Martin-Erb cannot state a claim in mandamus for the relief she sought, nor for other relief against the Missouri Commission on Human Rights.

I. MARTIN-ERB DID NOT STATE A CLAIM IN MANDAMUS.

A. The only relief that Martin-Erb could seek from the Commission, at this stage, is a reversal of the prosecutorial finding of no probable cause.

The only act by the Missouri Commission on Human Rights about which Martin-Erb actually complains **B** or even could complain, at this stage **B** is the decision of the Executive Director that there was not probable cause to believe that she had been discriminated against. In her complaint, Martin-Erb nonetheless sought from the circuit court "a full evidentiary hearing on the merits" of her claim, an order that Wal-Mart discriminated against her based on race, and that she "be made whole and offered reinstatement." (L.F. 3). In essence, she was attempting to litigate the merits of her claim **B** not the procedural issue that she complains about. If Martin-Erb could state a claim against the Commission or its chair, either under general rules of mandamus or under the statutes she cites, the only relief that she could logically obtain at this point would be an order that the Executive Director reverse her finding of no probable cause on Martin-Erb's complaint of discrimination.²

² Martin-Erb, by only seeking that the Commission file an answer, failed to state a claim against

The Commission staff was proceeding as to Martin-Erb's complaint in the fashion set out in The Missouri Human Rights Act. Chapter 213, RSMo. 2000. The Act delegates initial prosecutorial authority to the Commission's Executive Director. It directs an initial investigation, then provides that probable cause be determined, and thus Commission resources further expended, only "if the executive director determines after the investigation that probable cause exists for crediting the allegations of the complaint." RSMo. ' 213.075.3. The Missouri General Assembly, when it enacted ' 213.075.3, thus gave to the Executive Director the discretion to decide which cases should be acted upon by the Commission, *i.e.*, discretion to determine whether probable cause exists.

The Act specifies what happens after the Executive Director makes that decision. *If* she decides that there is probable cause, she ~~shall~~ immediately endeavor to eliminate the unlawful discriminatory practice by conference, conciliation and persuasion, and shall report the results to the commission.[@]*Id.* ~~A~~^[I]*f* in the judgment of the chairperson of the commission circumstances so warrant,[@] the commission then initiates a contested case. ' 213.075.5. Before Martin-Erb could obtain from the Commission the ~~A~~full evidentiary hearing[@] she seeks, her case would have to survive both preliminary, discretionary steps.

Martin-Erb's case never reached the second step; there is no Commission decision with regard to the initiation of a contested case, much less the holding of a hearing or the granting of relief, that the circuit court or this Court could review. As to the Commission and its chair, this appeal, then,

the Commission upon which relief could be granted.

addresses solely the question of whether Martin-Erb was entitled to a writ of mandamus ordering the Commission and its chair to reverse the Executive Director's finding of no probable cause. The answer to that question is a simple, **No.**

B. The Executive Director's finding cannot be reversed in mandamus because there is no clear, ministerial duty to find probable cause.

Martin-Erb provides neither logic, law, nor precedent to support a premise that is essential to her petition for mandamus: that a prosecutorial finding of no probable cause can be reversed by a circuit court with a petition for mandamus. Martin-Erb lacks such authority for a simple reason: the determination of probable cause is a discretionary decision, and mandamus will never lie to compel a government official to perform a discretionary act. *State ex rel. Bd. of Health Ctr. Trustees of Clay County v. County Comm'n of Clay County*, 896 S.W.2d 627, 631 (Mo.banc 1995).

There is no right to a writ of mandamus, it is discretionary. *State ex rel. Missouri Growth Assoc., et al. v. State Tax Comm'n, et al.*, 998 S.W.2d 786, 788 (Mo.banc 1999); *State ex rel. Johnson v. Griffin*, 945 S.W.2d 445, 446 (Mo.banc 1997). Only if there is a "clear, unequivocal, specific right to be enforced" will mandamus lie. *Missouri Growth Assoc.*, at 788. Because there is never, as a practical matter, a clear, unequivocal, specific right to a discretionary act, mandamus "cannot be used to control the judgment or discretion of a public official." *Id.*, quoting, *State Bd. of Health Ctr. v. County Comm'n*, 896 S.W.2d 627, 631 (Mo. banc 1995).

In her Substitute Brief, Martin-Erb does not suggest **B** because she cannot **B** that the probable cause determination is anything but discretionary. Instead she seeks to litigate such issues as the scope of the Commission's investigation and the facts on which the determination of no probable cause were

based. Substitute Brief at 15. But where significant factual issues must be determined, a party is attempting to adjudicate and mandamus is improper. *St. Louis Police Officers' Ass'n v. Sayad*, 685 S.W.2d 913, 917 (Mo.App. E.D. 1984). Her effort to reach behind the only conceivable agency decision **B** the finding of no probable cause **B** to prior events cannot evade the bar on writs of mandamus that reverse an official's discretionary decision.

C. Section 536.150 does not expand the scope of the mandamus remedy so as to permit Martin-Erb to obtain relief from the Commission or its chair.

In her Substitute Brief, Martin-Erb does not deal with the question of whether the probable cause determination is discretionary and thus outside the scope of mandamus as it is defined by rule or in equity. Instead she refers to ' 536.150, asserting that she can obtain mandamus relief by virtue of the statute. That is wrong.

Section 536.150 memorializes the limits discussed above. Though it permits judicial review of Aa decision which is not subject to administrative review,@it prohibits the circuit court from reversing such a decision when the Adiscretion@to make it is Alegally vested@in an Aadministrative officer or body.@ ' 536.150.1. Thus Martin-Erb could not obtain an order requiring the reversal of the Executive Director's determination of no probable cause.

Moreover, ' 536.150 does not purport to enlarge the scope of the mandamus remedy. The rule precluding interference with discretionary acts would limit the use of mandamus under ' 536.150 even if the express limitation were missing.

And ' 536.150 cannot be interpreted so broadly as to transform a preliminary decision by an employee regarding a prosecution into a final decision by an Administrative officer or body that is subject to review. Such a reading would expand the scope of reviewable decisions far beyond reason B and into a prosecutorial realm where such review is currently unknown.

Perhaps the key to properly limiting the scope of ' 536.150 is to recognize its application only to persons whose Arights, duties, or privileges@have been determined. Missouri law provides in Chapter 213 a manner in which those alleging illegal discrimination can protect their rights and privileges. Martin-Erb, by failing to seek a Aright to sue@letter, abandoned that protection. That she could sit back and wait for the Executive Director, then the chair, and finally the Commission to act in a contested case does not excuse her failure.

The statute does provide, of course, for action by the Commission B action that takes place once a Acontested case@is initiated, as discussed above. *See Hamby v. City of Liberty, Missouri*, 20 S.W.3d 515 (Mo.banc 2000). Martin-Erb argues this case as if such a case were solely for her protection. It is not. The Commission is a law enforcement agency. Though it may seek relief that eventually flows to an individual, its mandate is both broader and narrower than Martin-Erb implies. It is broader in that the Commission seeks to prevent discrimination not just on behalf of complainants, but to eliminate discrimination generally. It is narrower in that the Commission makes its own, independent determinations as to how to expend its resources in fulfilling its statutory mandate; it need not obtain complete relief even for a complainant who would be personally entitled to it. Thus the Commission plays a role that parallels that of a prosecutor proceeding under Chapter 407. That role involves

discretion at various steps **B** including the step at which the Executive Director decides whether, in her view, there is probable cause to proceed.³

The threat posed by Martin-Erb's position in this case is exacerbated by the manner in which it would interact with the implicit holding in *Wampler v. Director of Revenue*, 48 S.W.3d 32 (Mo.banc 2001). There, this Court effectively imposed on the state the burden of justifying any reviewable administrative decision that any aggrieved person chooses to challenge in circuit court. Here, Martin-Erb proposes to greatly expand the number of administrative decisions that are reviewable. The two rules combined threaten to significantly disrupt the work of administrative agencies, permitting plaintiffs to drag state officials to court on a whim. The court should decline to give

³ In her second Point Relied On, Martin-Erb addresses the two-year limitation on civil actions filed under ' 213.111. Suits under that statute are brought only against the respondent named in the complaint, here, Martin-Erb's former employer. Thus the Commission and its chair **B** who would not be subject to suit under that provision, were such suit permitted **B** do not address the ability of Martin-Erb to file such a suit.

' 536.150 such a reading, one that would remove any reasonable constraint on the right to judicial review.

Conclusion

For the reasons state above, the court should affirm the decision of the circuit court denying relief in mandamus.

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
State Solicitor

KEITH D. HALCOMB
Assistant Attorney General
Missouri Bar No. 43941

Broadway State Office Building
221 West High Street, 8th Floor
Post Office Box 899
(573) 751-8826
(573) 751-8464 (Fax)

ATTORNEYS FOR RESPONDENTS
MISSOURI COMMISSION ON
HUMAN RIGHTS AND
STERLING ADAMS

Certification of Service and of Compliance with Rule 84.06(b) & (c)

The undersigned hereby certifies that on this ____ day of October, 2001, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed postage prepaid, to:

Frank E. Wallemann
Jon E. Beetem, P.C.
505 E. State St.
PO Box 476
Jefferson City, MO 65102-0476

Lowell Pearson
Husch & Eppenger, LLC
235 E. High St.
PO Box 1251
Jefferson City, MO 65102

Alan L. Rupe
Epic Center
301 N. Main
Wichita, KS 67202

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and that the brief contains _____ words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

D. HALCOMB

KEITH